

BERNARD L. MARSH

IBLA 73-256

Decided August 20, 1973

Appeal from the decision of the Alaska State Office, Bureau of Land Management, which vacated a previous suspension of the statutory life of appellant's trade and manufacturing site claim.

Affirmed.

Alaska: Trade and Manufacturing Sites -- Applications and Entries: Generally --Equitable Adjudication:
Generally -- Settlements on Public Lands

Where by order of a state court the claimant of a trade and manufacturing site is enjoined from making any physical change in other nearby land, while allowing him continued access to his claim, the judicial restraint on the claimant's use of the other land will not serve to toll the running of the five year statutory life of the claim, and the fact that he finds it difficult or impossible to bring vehicles, construction equipment and building materials to the claim and conduct a business thereon will not afford any basis for equitable adjudication.

APPEARANCES: Bernard L. Marsh, pro se.

OPINION BY MR. STUEBING

On June 13, 1967, Bernard L. Marsh filed notice in the Anchorage Land Office that he had entered and occupied a certain tract of land, described by metes and bounds, as a trade and manufacturing site to be used as a camper and trailer park. The land office acknowledged the claim, which was assigned serial no. AA-968.

Subsequently, one Roger Kimball brought suit in the Superior Court for the State of Alaska (Third Judicial District) against Marsh and others, including the State of Alaska. In his amended complaint, dated July 12, 1971, Kimball alleged, inter alia, that he was the lawful claimant of T & M site number AA-3022, and that defendants had entered thereon in trespass with heavy equipment and appropriated a portion of said tract to their own use, removing earth, destroying trees, etc.

The amended answer of the State of Alaska acknowledged that it held a right-of-way, but denied that any part of that right of way was across Kimball's property.

The court, acting on plaintiff's motion, issued a preliminary injunction under which all parties were restrained from interfering with the use of the existing roadway, as depicted in Exhibit "A" attached to the order, and all parties were enjoined from doing any further work or making any physical change in the disputed property as defined in Exhibit "B". Kimball v. Marsh, No. 70-2051 (Super. Ct. Alaska, filed Aug. 12, 1971).

On January 4, 1972, the BLM's Alaska State Office issued a "Notice" whereby the statutory life of Marsh's claim was suspended by reason of the fact that the injunction of the Alaska Superior Court "prohibited him from doing any further work or improvements on certain specified lands," and restrained him "from interfering on a disputed roadway." This notice observed that the Department has held that the fact that occupancy of a settlement claim, lawfully initiated, is interrupted by order of a court does not operate as a termination or an abandonment of the settlement claim, citing Hall v. Armann, 40 L.D. 430 (1912). (Emphasis in notice). The notice then found that since Marsh was prevented by judicial restraint from further complying with the requirements of the applicable law, a suspension of the statutory life of his trade and manufacturing site claim would be granted until such time as the injunction was lifted. The notice recited that 306 days remained of the five year statutory term of the claim at the time the injunction issued, so that, presumably, the suspension was considered to be effective as of the date the injunction issued, and the term of the claim would continue for 306 days after the injunction was lifted.

However, on December 29, 1972, the Alaska State Office issued a decision which implied that it had made a mistake in suspending the statutory life of Marsh's claim. The decision noted that the land which was involved in the litigation and to which the injunction against further improvement applied, was not the land

claimed by Marsh. It noted further that Marsh was not prohibited by the injunction from gaining access to his claim, and it found that he was not restrained by order of the court from doing further work or development of his own claim. Accordingly, the State Office vacated its previous suspension of the statutory life of the claim effective upon Marsh's receipt of the decision, so that Marsh's claim would continue for 306 days after that date, within which he could file an application to purchase if he had qualified under the law.

It is from that decision that Marsh now appeals. In essence, he contends that as a practical matter the injunction had the effect of preventing development of his trade and manufacturing site because there is no vehicle access to the site. He asserts the injunction had the effect of preventing the construction of a bridge over the south branch of the Matanuska River because a location for the bridge cannot be chosen while the suit is pending. This, he says, prevents equipment and materials from being brought to the site and likewise prevents the operation of a business that requires the transportation of business clients or the accommodation of vehicles. He further alleges that he has applied to the State of Alaska for a right of way permit which is now challenged by the plaintiff.

It is clear that the injunction issued by the Superior Court did not involve appellant's site. The fact is that appellant chose a site for development of a camper and trailer park which had no vehicle access in apparent anticipation that such access could be constructed within the statutory life of the claim. If he was frustrated in his plans by the asserted rights of another, and by the delay in securing the necessary right of way from the State of Alaska, this can not operate to toll the running of the statutory term, nor does it afford a basis for equitable adjudication. The selection of this particular site was appellant's own choice, and the inherent problems of providing vehicle access thereto were assumed by him. The fact that such problems may be more difficult or complex than he realized is no reason to suspend the operation of the law.

This case is very like the circumstances which obtained in Jay Frederick Cornell, 4 IBLA 11 (1971), aff'd. Cornell v. Morton (D. Alaska, March 12, 1973). 1/ In Cornell, the claimant occupied a remote site which he intended to develop as a camp ground for use by the paying public. The site was adjacent to the proposed

1/ Appeal pending, 9th Cir. Court of Appeals.

route of a state highway, but the highway was not constructed on schedule, so that the commercial operation of the camp ground was prevented because of the difficulties of access. Nevertheless, this Board held that appellant's failure to prove occupancy and use of the site for the actual conduct of business during the statutory life of the claim could not be waived, even though the site may have had a prospective potential for use as a commercial camp ground. 2/

There is no statutory provision for extending the time for improving a trade and manufacturing site and developing productive industry thereon. Don E. Jonz, 5 IBLA 204 (1972); cf. Elizabeth Hickethier, 6 IBLA 306 (1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Anne Poindexter Lewis, Member

2/ While it is not necessary for resolution of this appeal, we note that the mere filing of a "notice of occupancy" of public land as a trade and manufacturing site does not create any right in the land which will preserve it against any other valid claims, entries or withdrawals. The right to acquire land as a T & M site is established only when it is actually occupied and used for the purposes of trade, manufacture or other productive industry. An application for a prospective business site is not within the law. Thelma S. Butcher, 7 IBLA 24 (1972); David G. Marks, A-31082 (January 27, 1970); Vernard E. Jones, 76 I.D. 133, 136, 137 (1969); Peter Pan Seafoods, Inc. v. Shimmel, 72 I.D. 242 (1965); 43 CFR 2562.3(d).

